

Lauren Spires

From: Sarah Adair <sarah.adair@capitol.tn.gov>
Sent: Monday, July 2, 2018 11:32 AM
To: Lauren Spires
Cc: Joshua Testa; Russell Moore
Subject: RE: AG response to UTK Sex Week opinion request
Attachments: Message from "RNP002673BFC2D9"

Follow Up Flag: Follow up
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Sorry Lauren, I was out last week. Attached is a scan of the request made by Sen. Briggs and the response received from the AG.

Hope this helps,
Sarah

From: Lauren Spires [mailto:Lauren.Spires@cot.tn.gov]
Sent: Thursday, June 28, 2018 1:43 PM
To: Sarah Adair
Cc: Joshua Testa; Russell Moore
Subject: AG response to UTK Sex Week opinion request

Hi Sarah,

I hope you are doing well and having a nice summer so far! The Comptroller's Office of Research and Education Accountability (OREA) has been asked to research UTK Sex Week. My colleague, Josh Testa, and myself have been assigned to the project.

It is our understanding that Senator Briggs submitted the attached opinion request relating to Sex Week to the Attorney General. It is also our understanding that the opinion request was denied. For the purposes of our research, is it possible to obtain a copy of the AG's denial letter/memo?

Please let us know if you have any questions about this request.

Thank you!

Lauren Spires

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Mission: To make government work better.

Richard M. Briggs, MD
Senator

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April 17, 2018

The Honorable Herbert H. Slatery III
Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202-0207

RE: Tennessee Code Annotated § 9-4-5119 – Sex Week

Dear General Slatery:

Pursuant to Tennessee Code Annotated § 8-6-109(b)(6), I am requesting a written legal opinion from the Office of the Attorney General concerning § 9-4-5119. I am making this request so that faculty and staff of The University of Tennessee can understand how to conform their conduct to subsection (a) concerning "Sex Week."

The factual background for my request is as follows:

- For the past six years, a registered student organization at the University, Sexual Empowerment and Awareness at Tennessee (SEAT), has organized and conducted a week-long event called "Sex Week" on the campus of the University of Tennessee, Knoxville (UTK). Sex Week activities have occurred in UTK buildings and in outdoor areas of the UTK campus that were open to use by any University registered student organization for free speech activities. SEAT has received funding for Sex Week from funds derived from the University's student activity fee or from funds donated to the University by private persons or entities. The University has not funded Sex Week activities with funds derived from state tax dollars or tuition dollars. Therefore, Sex Week activities have received no funding from any University source.
- On February 24, 2014, the Tennessee House of Representatives adopted House Joint Resolution 661, which addressed Sex Week at UTK and by which the House "condemn[ed] the administration of the University of Tennessee and expresses its displeasure with the University for permitting 'Sex Week' to be held on the UT-Knoxville campus for a second consecutive year." The Senate did not adopt House Joint Resolution 661.

- On March 13, 2014, the Tennessee Senate adopted Senate Joint Resolution 626, which “directed” The University of Tennessee Board of Trustees “to work with the administration of the University of Tennessee to implement a way in which each person responsible for paying the student activity fee may opt in to the allocation of fees to student organizations for student programming.” The House did not adopt Senate Joint Resolution 626.
- On June 19, 2014, in response to Senate Joint Resolution 626, The University of Tennessee Board of Trustees adopted a policy that gave every student the right to “opt-in” to the use of his/her student activity fee funds for student-organized programming such as Sex Week. Since the adoption of that policy, if a student fails, for any reason, to expressly authorize the University to allocate a certain amount or percentage of the student-activity for student-organized programming such as Sex Week, then that amount or percentage of the student’s student activity fee is allocated by the University for another use that benefits students.
- Using Education and General funds appropriated by the General Assembly (which include funds derived from state tax dollars), the University maintains information technology resources (e.g., internet sites, networks, e-mail systems) used by employees, students, and registered student organizations. The University permits incidental or casual personal use of those resources.
- Prior to the vote on the Conference Committee Report on House Bill No. 2248/Senate Bill No. 1912, the following discussion occurred on the floor of the House of Representatives:

Rep. Tilman Goins: “Thank you madam speaker and thank you sponsor for the bill and for the conference committee and what you bring back...um...so I was reading through the bill here and this is something very very important for my colleagues to know and to realize, you know a couple of years ago when sex week started at the University of Tennessee there was an uproar and we passed a Resolution. The University of Tennessee came back and told us they weren’t funding sex week. Now we know that not to be true because sex week is still held on the university of Tennessee campus, they said that their classrooms and everything else wasn’t considered funding even though I do very much consider an electric bill and a water bill for an activity that we don’t approve of, a funding source. Your bill says that they shall not fund or support sex week. Which is a very important clarifying factor for my colleagues to understand...um...if somebody came to me and they were, they were hungry and needing shelter and needed to get out of the heat, if I provide air conditioning for them I’m supporting them. My question for you then would be is: Can you define support in your bill for us?”

Rep. Micah Van Huss: "Absolutely, when the bill says we will not fund or support sex week, the intent is obviously funds, but for the support I would add buildings built with state funds, buildings remodeled with state funds."

Rep. Goins: "Thank you, in other words, if sex week were held on the campus or even in a classroom of that campus, that would be considered support and illegal under this act."

Rep. Van Huss: "Yes sir."

Rep. Goins: "Thank you for this bill, I can't wait to vote for it."

Based on those facts, I am requesting a written legal opinion on the following questions:

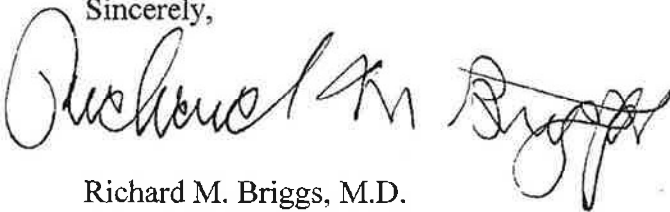
1. Is Tennessee Code Annotated § 9-4-5119(a) constitutional on its face under the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution?
2. Would any of the following scenarios violate the provision of Tennessee Code Annotated § 9-4-5119(a) concerning the expenditure of state funds to fund or support Sex Week?
 - Ten registered student organizations apply for funding for events they are organizing and will conduct in campus buildings or using campus outdoor spaces. The University provides funds derived from student activity fees to all ten registered student organizations for those events. One of the organizations receiving funding is SEAT, and SEAT uses the student activity fee funds for Sex Week events.
 - An auditorium in a particular building on campus is available for reservation by any registered student organization for organizational events. SEAT does not receive any direct funding for Sex Week events from the University from any funding source. However, the University allows SEAT to use the building for a Sex Week event, and the University pays for the costs of all utilities in the building that are used during the time that the Sex Week event takes place. Utilities costs are paid for using Education and General funds appropriated by the General Assembly (which include funds derived from state tax dollars).

- An outdoor green space is available for reservation by any registered student organization for organizational events. SEAT does not receive any direct funding for Sex Week events from the University from any funding source. However, the University allows SEAT to use the outdoor green space for a Sex Week event. Prior to the day of the Sex Week event, as part of regularly scheduled maintenance, University employees mowed the grass on the green space on which the Sex Week event occurred. The employees used equipment purchased with, and are compensated from, Education and General funds appropriated by the General Assembly (which include funds derived from state tax dollars).
- Using Education and General funds appropriated by the General Assembly (which include funds derived from state tax dollars), the University maintains a website that contains a campus event calendar. The event calendar lists a variety of campus activities including student activities that have not been organized or funded by the University. Any student or employee may log-in to the website and post an event to the calendar. The University allows SEAT to list Sex Week on the campus event calendar.
- The purpose of SEAT, as stated in the organization's constitution, is to organize and present Sex Week each year at UTK. SEAT complies with all steps required for being a registered student organization. The University continues to allow SEAT to be a registered student organization and to receive all of the benefits of being a registered student organization. Such benefits include the privilege of renting space in University buildings and borrowing laptop computers, tables, and tents.
- Using a University-provided e-mail account and a University network, SEAT sends an e-mail to all students advertising Sex Week events.
- A 98-ton chunk of Knox dolomite known as "The Rock" serves as an outdoor, designated public forum on the UTK campus. SEAT paints a message on "The Rock" that advertises Sex Week. University employees are paid to maintain the grounds surrounding "The Rock."
- A University faculty member serves as an advisor to SEAT while being paid by the University.
- A University faculty member serves as a panelist for a Sex Week program while being paid by the University.

3. If your response to Question #2 is "yes" for any of the scenarios, is Tennessee Code Annotated § 9-4-5119(a) constitutional as applied to that scenario?
4. If Tennessee Code Annotated § 9-4-5119(a) is unconstitutional on its face or as applied, are University employees who are responsible for controlling the expenditure of state funds bound to enforce Tennessee Code Annotated § 9-4-5119(a)?
5. If University employees are sued in their individual capacities for enforcing Tennessee Code Annotated § 9-4-5119(a), will the State of Tennessee provide defense counsel to those University employees and reimburse them for judgments if they are found not to have qualified immunity?

Given the intense legislative scrutiny of The University of Tennessee concerning Sex Week, I would appreciate your prompt attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Briggs". The signature is fluid and cursive, with the first name "Richard" being the most prominent.

Richard M. Briggs, M.D.

**7th SENATORIAL DISTRICT
KNOX COUNTY**

STATE OF TENNESSEE

Office of the Attorney General



HERBERT H. SLATERY III
ATTORNEY GENERAL AND REPORTER

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April 26, 2018

The Honorable Richard M. Briggs, M.D.
State Senator
770 Cordell Hull Building
Nashville, Tennessee 37243

Re: Opinion Request Regarding University of Tennessee Sex Week

Dear Senator Briggs:

This Office has received and carefully considered your April 17, 2018, letter requesting an expedited opinion regarding Tenn. Code Ann. § 9-4-5119(a) as it applies to the "sex week" event that has been organized and conducted by a student organization for the past six years on the campus of the University of Tennessee, Knoxville. Your letter explains that the purpose of the opinion would be to provide legal advice to the faculty and staff of UTK about their obligations under the statute with regard to sex week. The request seeks opinions (1) as to whether any one of nine "scenarios" would violate that statute, (2) whether the statute is constitutional on its face, (3) whether the statute is constitutional as applied to each of the nine scenarios, (4) what the enforcement responsibilities of the UTK faculty and staff are if the statute is unconstitutional, and (5) whether the State will defend and indemnify any UTK employees who may be liable for enforcing the statute.

We regret that, for several important reasons, we are not able to provide the requested opinion. First, we believe that our legal advice or guidance to or for the benefit of UTK will be much more effective when we provide it directly to UTK because those communications are subject to the attorney/client privilege. Since all Attorney General opinions are available to the public at large, we forgo that privilege when we put that advice in the form of an Attorney General opinion. Second, to avoid intruding inappropriately into the administrative or judicial process, this Office has a longstanding policy of not opining on questions concerning matters or issues pending before administrative or judicial bodies or matters involving potential or threatened litigation. In particular, this Office cannot issue opinions related to litigation in which it is or may become involved. Thus, we may not opine on the questions you have posed because those questions directly implicate issues that could become the subject of litigation, as indeed at least one of the questions itself assumes. Moreover, this Office may be called upon to become involved in any

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such litigation. We may, for example, be required to defend the constitutionality of the statute. Third, in most all instances, answers to the scenario-related questions would be contingent on facts and circumstances that are not included in the request and could vary depending on the particular facts and circumstances. Fourth, answers to the defense-and-indemnification questions, similarly, would depend on the particular facts and circumstances of each individual case.

I am sorry that we are unable to respond to this request but trust that you understand our position. We look forward to working with you in the future.

Sincerely,

A handwritten signature in black ink, reading "Andrie Blumstein". The signature is written in a cursive, flowing style with a large, sweeping initial 'A'.

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

cc: Herbert H. Slatery III, Attorney General and Reporter